

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 01-0126 CSET
CONTROLLED SUBSTANCE EXCISE TAX
FOR TAX PERIODS: 1998

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ISSUE

1. Controlled Substance Excise Tax: Imposition

Authority: IC 6-7-3-5. IC 6-8.1-5-1 (b), Hurst v. Department of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999).

Taxpayer protests the imposition of the Controlled Substance Excise Tax.

Statement of Facts

On October 2, 1998, the taxpayer was arrested for the possession of amphetamine. The County Prosecutor of the appropriate county on December 27, 2000 sent the Indiana Department of Revenue written notification that there would be no prosecution for the charge of the possession of the amphetamine. On April 6, 2001, the Indiana Department of Revenue issued a Record of Jeopardy Finding, Jeopardy Assessment Notice and Demand in a base tax amount of \$18.80. A telephone hearing was held on August 8, 2001. Further facts will be provided as necessary.

1. Controlled Substance Excise Tax: Imposition

Discussion

IC 6-7-3-5 imposes the Controlled Substance Excise Tax on the possession of amphetamine in the State of Indiana. Indiana Department of Revenue assessments are presumed to be correct and the taxpayer bears the burden of proving that an assessment is incorrect. IC 6-8.1-5-1 (b). Possession of the controlled substance can be either actual or constructive. Hurst v. Department

of Revenue, 720 N.E.2d 370 (Ind. Tax. 1999), Hall v. Department of Revenue, 720 N.E.2d 1287 (Ind. Tax 1999). Although both direct and circumstantial evidence may prove constructive possession, proof of presence in the vicinity of drugs, presence on property where drugs are located, or mere association with the possessor is not sufficient. Hurst at 374-375. To prove constructive possession, there must be a showing that Taxpayer had not only the requisite intent but also the capability to maintain dominion and control over the substance. Hurst at 374.

In the Hall case, the Indiana Department of Revenue assessed Controlled Substance Excise Tax on a husband and wife. The couple owned and lived together in a residence. The marijuana was grown in a basement room with a locked door. Only the husband had a key to the room. Although the wife co-owned the house, lived in the house, did laundry in the room adjacent to the room which housed the marijuana, and the smell of marijuana permeated the house; the Court found that the wife did not have the capability to maintain dominion and control over the marijuana. Therefore she did not constructively possess the marijuana and the Controlled Substance Excise Tax was improperly imposed against the wife.

The issue to be determined in this case is whether or not Taxpayer had constructive possession of the amphetamine. After receiving permission from the taxpayer to search the premises, the police found the amphetamine in a Winnebago registered to her husband. Evidence indicated that the taxpayer regularly drove a car registered in her name. The evidence in this case does not support a finding that the taxpayer had the intent and capability to maintain dominion and control over the amphetamine found in her husband's motor vehicle.

Finding

The taxpayer's protest is sustained.